NO. 12501

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AND SUPPORTING BRIEF

DALTON PIERSON,
United States Attorney,
Butte, Montana;

EMMETT C. ANGLAND,
Assistant United States Attorney,
Great Falls, Montana.
Attorneys for Appellee.

NO. 12501

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AND SUPPORTING BRIEF

DALTON PIERSON,
United States Attorney,
Butte, Montana;

EMMETT C. ANGLAND,
Assistant United States Attorney,
Great Falls, Montana.
Attorneys for Appellee.

INDEX

CASES

STATUTES

TEXTS

NO. 12501

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AND SUPPORTING BRIEF

Comes now the Appellee, United States of America, and respectfully petitions the Court that it grant to it a rehearing in the above entitled cause.

In support of its petition for rehearing appellee respectfully submits the following reasons, to-wit:

I.

That in rendering its decision herein the Court has overlooked controlling decisions of United States Courts and other courts and that its decision is in conflict therewith.

II.

That in rendering its decision herein the Court has overlooked or misapplied certain Acts of Congress controlling the Court on this appeal.

ARGUMENT

At the outset in submitting this petition for rehearing, we feel obliged to apologize to the Court for not having submitted additional authorities in our brief in this case on the point upon which the Court has determined the case should be reversed.

We are of the view that the charge given by Judge Pray with reference to criminal negligence is supported by the authorities. The charge was not, as we view it, given with any thought that this was a negligence case involving careless conduct. Rather, as we will hereafter point out, the authorities support the charge as given by the trial Court permitting the jury to determine that intent may be supplied by criminal negligence.

As we read the opinion of this Court it is determined that criminal negligence cannot supply the intent necessary to be found by the jury in order to sustain a conviction for a violation of Section 201, Title 18, U. S. C. Ordinarily the rule is as stated in *22 C. J. S., Sec. 29, page 84.*

> "Except as otherwise provided by statute, an overt act to constitute a crime must be accompanied by a criminal intent or by such negligence as is regarded by law as equivalent to a criminal intent."
>
> " * * * To constitute a crime the act must, except as otherwise provided by statute, see infra No. 30, be accompanied by a criminal intent on the part of accused, or by such negligent and reckless conduct and indifference to the consequences of conduct as is regarded by the law as equivalent to a criminal intent."

Wherein does the definition of criminal intent given by Judge Pray differ. He states:

> "Now criminal negligence in that connection means the doing of an act with a reckless disregard of the

consequences, not caring particularly what happened." (R. 364).

Surely if that was the state of mind of the appellant Schneider he did possess a specific criminal intent to offer money for a bribe and to pay money as a bribe. Conduct such as that defined by Judge Pray in his charge to the jury is we submit sufficient to supply the requisite intent which the jury by their verdict did find that the defendant possessed.

In *Branson's Instructions to Juries, Second Edition, Sec. 581 (2)* we find approval given to a similar charge to that given in this case:

> "The court instructs the jury that although it is the law in this state that a criminal offense consists of a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, yet where, without intoxication, the law will impute to the act a criminal intent, as in the case of wanton killing without provocation, voluntary drunkenness is not available to disprove such intent."

The common law rule, while it does not appear in the United States Code, is adopted in the *Montana Codes, Section 94-117, Revised Codes of Montana, 1947:*

> "In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

This section in Montana was adopted from the California Code (Cal. Pen. C. Sec. 20).

The Montana Supreme Court has held that an instruction embodying this section should always be given,

State v. Allen,
34 Mont. 403; 87 Pac. 177, 183.

In its decision this Court stated that the defendant could not possibly have negligently offered a bribe or given one but the jury under the instructions given could have concluded that mere careless conduct was sufficient to sustain his guilt. The fact is that there is no evidence of negligence in the case. We note in the case of *Lonergan v. United States, 88 F. 2d 591 at 595* this Court held, to show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which the instructions could be properly applied:

> "Assignments 28 and 29 are to the refusal of requested instructions. Assuming, without deciding that these were correct statements of law, it does not follow that, in refusing them, reversible error was committed. Error, to be reversible, must be shown to have been prejudicial. Walton v. Wild Goose Mining & Trading Co. (C. C. A. 9) 123 F. 209, 219. To show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which such instructions were properly applicable. (Cases cited)."

To the same effect are:

> Conway v. United States,
> 142 F. 2d 202, 205;
>
> Todorow, et al. v. United States,
> 173 F. 2d 439, 445.

Now the logic of that statement is as we all know, instructions operate only upon evidence and if an instruction is given and there is no evidence upon which the instruction can operate then the instruction cannot be held to have prejudiced the objecting party. It is to be noted with what care Judge Pray charged the jury that their verdict should be based solely upon the evidence presented in the case.

Particular attention is directed to the following portion of the charge:

"Now, gentlemen, here is something that the court should make a statement on. You have noticed some colloquies and disputes between counsel and between the court and counsel during the progress of this trial. Now you will not be influenced by colloquies or disputes during the trial between counsel or between counsel and the court or between the court and counsel, or counsel and the witnesses, or remarks or statements, or any remark or statement not based upon the evidence. You will base your verdict solely upon the evidence submitted to you and wholly disregard the remarks of counsel not bearing upon the evidence, and wholly disregard anything you may have heard or read outside of the evidence, and any evidence erroneously submitted and afterwards excluded you will also disregard. Now that also refers to anything you may have heard about this case or read about it on the outside at any time or during the progress of this trial. You are to dismiss it wholly from your minds and make up your minds as to what your decision will be from a discussion of the evidence here and discussion of the exhibits that have been introduced in evidence in this case which you may wish to read and consider and further discuss. Now the case is based upon that, and that solely, the evidence presented here and the exhibits presented here." (R. 371).

We call attention to the Acts of Congress to point out that even if we should, as we do not, admit for the purposes of argument, that there was error in defining criminal negligence, yet that error cannot in our opinion by any stretch of the imagination, have prejudiced the defendant.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

"Harmless error. Any error, defect, irregularity or

variance which does not affect substantial rights shall be disregarded."

Rule 52(a) of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A.

Section 2111, Title 28, U. S. C. A., provides:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This Court has stated with respect to Rule 52(a):

"It was to cover cases precisely like the present, in which a convicted defendant seeks to escape condign punishment by raising technical objections, that Rule 52(a) of the new Federal Rules of Criminal Procedure, 18 U. S. C. A. following section 687, was promulgated."

Phelps v. United States,
160 F. 2d 626, 629.

(The record in that case will show that an almost identical instruction to the one found erroneous here was given.)

and again,

"The jury was sufficiently instructed and could not have been misled by the instruction complained of."

Himmelfarb v. United States,
175 F. 2d 924, 943.

and again,

"We have examined this record with care to assure ourselves that substantial rights of appellants (who did not testify) have not been invaded by the wrongful admission of evidence and by the instructions to the jury. The instructions adequately informed the jury concerning the weight to be given circumstantial evidence and the necessity of receiving with caution the testimony of an accomplice or co-conspirator; the quantum and character of proof necessary to establish the existence of a conspiracy; the element of reasonable

doubt regarding the guilt of any one of the appellants, and the necessity of applying the rule of reasonable doubt to every material element of the events charged in the indictment. The rule of proof as to the establishment of the commission of overt acts was properly stated. From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury."

Blumenthal et al. v. United States,
158 F. 2d 883, 891.

According to the opinion of the United States Supreme Court that it had considered all of petitioners contentions in granting certiorari it can only be assumed that the United States Supreme Court did affirm the above statement of this Court. See *Blumenthal v. United States, 332 U. S. 539; 68 S. Ct. 248; 92 L. ed. 154.* In yet another case this Court stated:

"The court in the present case fully instructed the jury that they should confine themselves to considering only the evidence introduced; that such inferences as they might draw must be based upon that evidence alone, not upon speculation as to evidence which might have been introduced; and that statements of counsel in argument or presentation are not evidence. Refusal to add appellants' proposed cautionary instruction under these circumstances, if error, was not prejudicial."

Nye & Nissen et al. v. United States,
168 F. 2d 846, 857.

Consistent with the foregoing decision we call attention of the Court to the impartial and scrupulously fair charge given in this case. It is to be particularly noted that the trial judge advised the jury that he did not comment on the evidence in this case, but again cautioned the jury to apply the rules of law to the evidence. (R. 373).

In reviewing this matter we must bear in mind that in

using the words criminal negligence the Court was not making criminal negligence an issue in the case as might be thought from reading the objection to the instruction made by counsel for the defendant as follows:

> "That the instructions of the court are erroneous in defining in this case as one element of a crime criminal negligence and then in turn defining criminal negligence because the gist and substance of this case is intent and the acts or those charged to have been done must have been done intentionally and no question of criminal negligence can be considered by the court in relation thereto as intent is a material part of the charge." (R. 375).

The Court was not speaking of negligence as applied to civil cases. The Court was clearly referring to intent and did not by the charge complained of make criminal negligence a separate element of the crime. To take that view would be doing exactly what was condemned by the Court in *United States v. Angelo (3 cir.) 153 F. 2d 247 at 252 wherein the Court stated:*

> "The exception to the charge on the ground that the court misused the word 'presumption' is untenable. Taken out of context, there might be some basis for this contention. There is none, however, when read in the light of the remainder of the charge."

If this Court is of the view that no mention of criminal negligence should have been made, yet we submit that the charge should be interpreted in the light of the conceded facts of the case as stated in *Buckley v. United States, 33 F. 2d 713, 718:*

> " * * * Under the conceded facts of this case, there was no necessity for instructing as to criminal intent with the precision that would sometimes be appropriate. If Buckley offered a bribe, as testified to by Eckhart, the offer necessarily carried with it a criminal

intent. If Buckley told the truth, no offer whatever was made by him. Under such circumstances, there is little room for controversy about criminal intent. Moreover, the essential criminal intent under this statute is nothing but the intent to influence the action of the officer in any matter of official duty before him, and this element of the crime was expressly stated by the judge in the instructions which he gave. Under the facts of this case, there is no substantial difference between saying that defendant must have a criminal intent and saying that the bribe which he offered must have been for the purpose of influencing the officer as to his official duty."

* * *

" * * * However, a charge is always to be interpreted in connection with the conceded facts of the case; and here there was no room for suggesting to the jury, nor would it have been entitled to consider, the idea that if Buckley made the disputed offer it was made with any purpose except to induce the nonperformance of duty. We are satisfied that any omission of a more formal charge on the subject of intent was without prejudice."

The evidence of guilt in the record in this case is so clear and convincing that we cannot see how possible harm could have been done to the defendant by the instruction held erroneous in the Court's opinion. Rather we believe this Court should reiterate the rule laid down in *McCoy v. United States, 169 F. 2d 776, 787 as follows:*

"Our method of trying those accused of crime is to submit the issue of guilt or innocence to a jury upon the evidence adduced and the applicable law as given it by the court. When the case has been submitted to the jury for decision under the instruction that guilt is only to be found in case the jury regards guilt as the only reasonable determination, the verdict should not be set aside by us unless as a matter of law we should find that there is no adequate support in the evidence for such determination. Otherwise we should be interfering

with the jury's function. We cannot find such lack of support in the evidence of our case."

There is ample evidence to support the verdict in this case.

CONCLUSION

We respectfully submit that this petition for rehearing should be granted and the judgment of the trial Court affirmed.

Respectfully submitted,
DALTON PIERSON,
United States Attorney;
EMMETT C. ANGLAND,
Assistant United States Attorney.

I, Emmett C. Angland, do hereby certify that I am a member of the bar of this Court and one of the attorneys of record in the foregoing cause; that the foregoing petition for rehearing, prepared and presented on behalf of appellee, for whom I am one of the attorneys, is in my opinion well founded and is not interposed for delay.

EMMETT C. ANGLAND,
Assistant United States Attorney.